Supreme Court, U.S.
FILED
FEB 2 1998
OFFICE OF THE CLERK

No. 97-855

In The

Supreme Court of the United States

October Term, 1997

In the Matter of the Estate of
ROBERT L. JOHNSON, Deceased

ROBERT M. HARRIS and ANNYE C. ANDERSON,

Petitioners,

vs.

CLAUD L. JOHNSON,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Mississippi

REPLY FOR PETITIONERS

Of Counsel:
WHITMAN MOUNGER
Whittington Building
Suite 2
Post Office Box 1123
Greenwood, Mississippi
39830-1123
(601) 453-7605

LEO NEVAS*
STEPHEN E. NEVAS
NEVAS, NEVAS & CAPASSE
246 Post Road East
Post Office Box 791
Westport, Connecticut
06881-0791
(203) 226-1211
Counsel for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, 520 U.S. ___, 137 L. Ed. 2d 203, 117 S. Ct. 1028 (1997) 3

Lalli v. Lalli, 439 U.S. 259 (1978) 5

Mills v. Habluetzel, 459 U.S. 91 (1982) 5, 8

Trimble v. Gordon, 430 U.S. 762 (1977) 5, 6, 7, 8

Young v. Biggers, 917 F.2d 873 (C.A. 5th, 1990)..... 4

STATUTES

Federal Rules of Civil Procedure 12(b) 4

Mississippi Code Ann. sec. 91-1-15 (1972) 7

Mississippi Rules of Civil Procedure 12(b)..... 4

Supreme Court Rule 14(1)(g)(i)..... 2

28 U.S.C.A. sec. 1257 1

PETITIONERS' REPLY BRIEF

The Respondent has not replied to the substance of Petitioners' argument that they have been denied the fundamentals of procedural due process by the Mississippi Supreme Court's waiver of a period of limitations without notice or the opportunity to offer evidence or defenses in any adversary proceeding. Nor has the Respondent answered Petitioners' argument that the Mississippi Court's decision conflicts with *Trimble v. Gordon,* 430 U.S. 259 and *Mills v. Habluetzel,* 456 U.S. 91 by ignoring the problems inherent in stale claims and allowing a man born out-of-wedlock to seek an inheritance from his asserted father's estate more than 60 years after he was born.

ARGUMENT

I. Petitioners properly raised a federal question at their first opportunity, thereby providing this Court with jurisdiction to review the decision below on a writ of certiorari pursuant to 28 U.S.C. sec. 1257.

The injury to the Petitioners' rights to due process under the Fourteenth Amendment did not take place at trial but on appeal. The injury occurred when the Mississippi Supreme Court, in its decision of March 28, 1996 *sua sponte* invoked and applied an evidence-dependent doctrine (*executorship de son tort*) to waive a period of limitations for claims by out-of-wedlock children without affording the Petitioners any notice or opportunity to gather evidence, offer defenses, brief or argue the rule which the Court applied or the facts which it assumed.

At their first opportunity to raise this claim Petitioners did so in a Petition for Rehearing on April 12, 1996.

> (Petitioners) believe that to deny them the right to assert defenses to the doctrine of *executor de son tort*, on which the Court bases its decision, would deny them the essentials of notice and an opportunity to be heard which form the basis of Due Process pursuant to the Fourteenth Amendment of the United States Constitution. (Petition for Rehearing, April 12, 1996, at 5).

In fact, Petitioners claim for denial of Due Process is repeated four times within their Petition for Rehearing at 8, 9, 16 and 5.

This claim is cited in the Petition for Certiorari, 8-9, ("Proceedings before the Mississippi Supreme Court") and the Appendix to their Petition for Certiorari also refers to this claim, all in conformity with this Court's Rule 14(1)(g)(i).

The response of the Mississippi Supreme Court to the Petition for Rehearing confirms that the Court had an appropriate opportunity to be aware of and respond to Petitioners' Due Process claims. Four members of the Mississippi Court who dissented from the decision to deny Rehearing explicitly acknowledged and adopted Petitioners' Due Process argument:

> " . . . (T)he Court has decided to apply a new doctrine on an appeal from a grant of summary judgment to dispose of a material issue of law adversely to the appellees. Thus, the appellees are wholly deprived of an opportunity to confront this claim with proof. The Court should

not be the instrument of such a blatant denial of due process."

"As the petitioners point out in the request for rehearing, the doctrine of *executorship de son tort* that has been utilized by the Court to reach its conclusions is subject to defenses that the petitioners could have asserted had Claud Johnson invoked this doctrine in support of his claim of heirship in the Chancery Court below. Indeed, that doctrine was never raised by any party: not in the Chancery Court below, not in briefs on appeal, not even at oral argument. This Court has reversed the chancery court's grant of summary judgment on a clear statute of limitations issue, then, on a fact-intensive legal theory of fraud, and has rendered judgment in favor of the party opposing summary judgment. Petitioners have had no opportunity to make any record on their liability as *executrices de son tort,* nor an opportunity to assess the causal connection between any such liability and the statute of limitations here at issue in Claud's claim. They are entitled to a remand to develop a record on this question." (Appendix, Petition for Certiorari, at 12-13).

The Petitioners have satisfied the requirement that a state court should first have an opportunity to consider federal claims. *Adams v. Robertson,* 520 U.S. ___, 137 L. Ed. 2d 203, 117 S. Ct. 1028 (1997).

II. Petitioners' Motion to Dismiss was converted to a Motion for Summary Judgment by the Mississippi Rules of Civil Procedure.

The initiating act in this chain of events, the Motion of Robert M. Harris and Annye C. Anderson to Strike the Affirmative Allegations and Dismiss the Claim of Claud Johnson (R. Vol. II, 269), was converted to a Motion for Summary Judgment by operation of Mississippi Rule of Civil Procedure (MRCP) 12(b) when Movants (here Petitioners) submitted matter outside the pleading.

This Rule provides that if "matters outside the pleading are presented to and not excluded by the court, the matter shall be treated as one for summary judgment." The Mississippi Rule is identical in all material respects to Federal Rule of Civil Procedure 12(b). On June 17, 1992 the Petitioners filed a document containing matters outside the pleading, a lengthy Affidavit by Annye C. Anderson. (R. Vol. III, 357). Respondent offered no document and cited no evidence in reply to the summary judgment proceeding. (On appeal to the Mississippi Supreme Court, Respondent submitted supposed evidence, none of which had been offered or tested in any adversary proceeding.) The Anderson Affidavit was admitted by the Chancery Court. (R. Vol. 4, 9) and the proceeding thereby became one for summary judgment. *Young v. Biggers,* 917 F.2d 873, 876 (C.A. 5th, 1990).

III. A State's interest in the just and orderly disposition of decedent's estates does not insulate it, as the Respondent suggests, from affording procedures to claimants that are consistent with the Fourteenth Amendment.

Nothing demonstrates the relevance of constitutional principles to this matter more than the decisions of this Court that rely on the Equal Protection Clause of the Fourteenth Amendment to require that states allow a child born out-of-wedlock to, in some circumstances, claim inheritance from the estate of the man they claim to be their father.

In *Trimble v. Gordon*, 430 U.S. 762 (1977) and *Mills v. Habluetzel*, 456 U.S. 91 (1982), this Court held that the state's administration of estates must yield to the Equal Protection clause of the Fourteenth Amendment to the degree that they must entertain such claims to inheritance by out-of-wedlock children, subject to their vigilance to the unique dangers inherent in these claims and appropriate measures to minimize them. The risk is that these claims can arise so long after the birth of the claimant that they cannot be fairly adjudicated.

> The State's interest in avoiding the litigation of stale or fraudulent claims will justify those periods of limitation that are sufficiently long to present a real threat of loss or diminution of evidence, or an increased vulnerability to fraudulent claims. *Mills*, 456 U.S. 91, 99; see also *Lalli v. Lalli*, 439 U.S. 259, 269-272 (1978); *Trimble*, 771.

In this matter, the Mississippi Court has gone to an opposite extreme, one never anticipated by *Trimble, Lalli* or *Mills*. It has waived a period of limitations without

notice, evidence or a hearing to allow the claim of a man more than 60 years old when he first lodged his claim, 54 years after the Decedent's passing. The Petitioners apologize to the Court for miscalculating his age as 61.

Respondent cites no modern case in which this or any other court has held that an individual's right to due process under the Fourteenth Amendment or any other constitutional right must fall to the State's asserted interest in providing for the administration of decedent's estates. Yet, that is what he seeks here.

IV. Respondent's Brief in Opposition is grounded on numerous inaccurate assertions of fact that are not supported by the Record, as follows:

1. The Respondent claims that an "R.L. Johnson" is his biological father and that this person is the Decedent. There is no proof or finding of his claim.

2. There is no known basis in fact or in the record for the Respondent's assertion that he "lacked knowledge of an estate against which he could assert a claim. Further, the record provides no reason to believe that the Respondent was not previously aware of his asserted paternity or, that he was in any way prevented or discouraged from alleging that the Decedent is his biological father or, that he could not use the opportunity provided to him by Mississippi Code Ann. sec. 91-1-15 to assert his claim within the period of limitations specially established in response to *Trimble*, supra.

3. The Decedent made 41 recordings. Some had been offered for sale to the public prior to his death in 1938. There is nothing in the record to establish that the Decedent "died a virtual pauper".

4. It is incorrect to claim that Mrs. Anderson admitted she made no effort to locate potential heirs of the Decedent.

5. Respondent's statement that as Administratrix Mrs. Anderson reported that the Estate assets were "miscellaneous and unknown" and that the Estate, at the time of her report contained no property or money is misleading since it does not indicate why she was unable to locate Estate property at that time.

6. It is incorrect and there has been no finding that Mrs. Thompson "sold Mr. LaVere all of her purported right, title and interest in and to the musical works and recordings of Robert L. Johnson, as well as other documents, photographs, memorabilia and other material." To the extent that there was any agreement between Mrs. Thompson and Mr. LaVere, it was formally rescinded by Mrs. Thompson. (R. Exhibits F, G, from Hearing of 5/22/91).

7. Respondent's assertion that Mrs. Anderson did not act in conformity with the duties of her office is incorrect. The Chancery Court made a pointed statement, cited in the Petition for Certiorari at 17 and in the Record that it did not make such a finding and was changing administrators only because of a potential heirship contest. (R. Vol. 4, Hearing of May 22, 1992, 9, et seq.)

CONCLUSION

The decision of the Mississippi Supreme Court raises a serious federal question affecting the scope and true meaning of this Court's prior decisions in *Trimble v. Gordon* and *Mills v. Habluetzel*. If not reversed or remanded for an initial evidentiary hearing it will compel the Petitioners in this matter to defend a claim of paternity and inheritance substantially more than a half century after the birth of the claimant and the passing of the Decedent when it is recognized that memories are vague, witnesses have died and evidence is virtually non-existent. This decision is also capable of repetition. It is likely that other courts will, as a result, believe they are permitted to cast aside periods of limitation without an evidentiary hearing and authorize paternity and inheritance claims against estates and other heirs by aging persons purporting to be biological heirs of the decedent in circumstances where evidence, witnesses and recollections are equally scarce.

Respectfully submitted,

LEO NEVAS*
STEPHEN E. NEVAS
NEVAS, NEVAS & CAPASSE
246 Post Road East
Post Office Box 791
Westport, Connecticut 06881-0791
(203) 226-1211
Counsel for Petitioners

**Counsel of Record*